

EXHIBIT D

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 - - - - - x

5 In the Matter of:

6

7 ADMINISTRATIVE CASE RE: 08-01789 (SECURITIES INVEST-

8 ADVERSARY PROCEEDING),

9

10 Debtor.

11 - - - - - x

12

13 Adv. Case No. 10-04995-smb

14 - - - - - x

15 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.

16 MADOFF INVESTMENT SECURITIES LLC,

17 Plaintiff,

18 v.

19 TRUST u/art FOURTH o/w/o ISRAEL WILENITZ,

20 Defendants.

21 - - - - - x

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1 Adv. Case No. 10-05184-smb
2 - - - - - x
3 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.
4 MADOFF INVESTMENT SECURITIES LLC,
5 Plaintiff,
6 v.
7 LAURA ANN SMITH REVOCABLE LIVING TRUST et al,
8 Defendants.
9 - - - - - x
10
11 Adv. Case No. 10-04352-smb
12 - - - - - x
13 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L.
14 MADOFF INVESTMENT SECURITIES LLC,
15 Plaintiff,
16 v.
17 RAR ENTREPRENEURIAL FUND. LTD. et al.,
18 Defendants.
19 - - - - - x
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1 U.S. Bankruptcy Court
2 One Bowling Green
3 New York, NY 10004
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5 May 17, 2016

6 10:51 AM
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9 B E F O R E :

10 HON STUART M. BERNSTEIN

11 U.S. BANKRUPTCY JUDGE
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15 Hearing re: 10-04995-smb, 10-05184-smb, 10-04352-smb The
16 Trustee's Request For Leave To File A Motion For a
17 Protective Order in Wilentiz.
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25 Transcribed by: Sonya Ledanski Hyde

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1 ALSO PRESENT TELEPHONICALLY:

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P R O C E E D I N G S

THE COURT: Madoff. Wait, I have one more...

MR. JACOBS: Good morning, Your Honor. Edward

Jacobs on behalf of the Trustee. I believe we're here this morning to discuss our April 6th letter seeking a protective order concerning certain discovery served by the defendant in the Wilenitz matter. Just to avoid any confusion from the start, there are 19 discovery requests at issue, but in the version served by the Defendant they're numbered 1 through 18, and one of them is unnumbered. So, by my count there are 19 requests in total. And they span a number of various topics, and I'm prepared to go through them each specifically today as briefly as I can.

But before I do, I would like to just provide a little bit of context to the Court, which I think would be helpful about what's been happening in discovery in this case. The Wilenitz matter is a case with a demand amount of, approximately, \$280,000. To be fair, Ms. Chaitman has told us that she intends to serve this identical discovery in all of her over 100 cases, so that would obviously implicate a number of other defendants with various demand amounts.

So, we feel that it's critically important that we have the issues resolved as quickly as possible so we don't needlessly have to duplicate litigation by arguing about

1 these same things in all of those cases.

2 What the Trustee has done in discovery in this
3 case is quite remarkable, and I believe unprecedented, and
4 we're very proud of it. Without even receiving a discovery
5 request, we provide every single defendant with what we
6 refer to as their core account documents, which are their
7 customer statements, the cash activity of their accounts,
8 their correspondence files with all of their correspondence
9 to and from BLMIS over the life of their account; the
10 account opening and closing documents; and in addition to
11 that all of the applicable financial statements from BLMIS's
12 financial institutions showing the bank transfer records
13 from those independent third parties with respect to the
14 cash activity in each and every single account.

15 Where we don't have a complete set of customer
16 statements, we produce portfolio management reports, which
17 contain exactly the same information of the cash activity
18 over the life of the account. Where we don't have those, we
19 produce spiral notebooks where various employees over time
20 at BMOIS kept meticulous notes of that cash transaction
21 activity.

22 And we provide that to every defendant. Wilenitz
23 is no exception. We produced, I believe, approximately,
24 19,000 records that we've indexed to make it easy for the
25 defendant to navigate exactly what's in that --

1 THE COURT: 19,000 records for Wilenitz?

2 MR. JACOBS: For the Wilenitz accounts, correct,
3 over the life of their accounts. And that includes all of
4 the items that I just discussed.

5 In addition to that, obviously, it is the
6 Trustee's burden of proof to prove that BLMIS was operating
7 a fraudulent Ponzi scheme and was insolvent. So, as the
8 Court I believe --

9 THE COURT: Why do you have to prove insolvency?
10 You don't have to prove insolvency for an intentional
11 fraudulent transfer. These are good faith cases.

12 MR. JACOBS: Right. Well, that is, I believe, our
13 burden in the bad faith actions as well.

14 THE COURT: Why? To prove insolvency in an actual
15 fraudulent transfer claim -- I've never heard of that.

16 MR. JACOBS: Well, that may very well be correct,
17 Your Honor, but nonetheless, we have endeavored to make all
18 of BMOIS's financial records available.

19 THE COURT: Let me ask, Ms. Chaitman, do you think
20 that insolvency is an issue in these cases? Since their
21 limited to intentional fraudulent transfers?

22 MS. CHAITMAN: I do, Your Honor.

23 THE COURT: Why?

24 MS. CHAITMAN: If, in fact, they could only
25 recover transfers made within the last two years, then the

1 insolventy wouldn't be an issue. However, they are going
2 back to the 1980s...

3 THE COURT: But not in the good faith cases.

4 MS. CHAITMAN: ...to calculate...

5 THE COURT: Oh, but those aren't -- I see what
6 you're saying. But, you know, we've been through that one
7 already. And those aren't transfers in the sense that we've
8 been talking about. And I think the District Court judge
9 agreed that those weren't transfers in the sense that the
10 Court's own conveyance laws mean transfers.

11 MS. CHAITMAN: Here's my thinking, Judge, and
12 perhaps you'll disagree with me, but the Trustee makes a
13 determination of what each defendant's net equity is.

14 THE COURT: Right.

15 MS. CHAITMAN: He does that by going back to the
16 inception of the original account. In my opinion, he has to
17 establish that Madoff was insolvent in 1980 because
18 otherwise, how can he invalidate a position that the
19 Defendant or the Defendant's grandfather had in 1980? I
20 think he has to prove -- I think the Trustee has to prove
21 that Madoff was insolvent and operating a Ponzi scheme for
22 the entire period for which he's netting out --

23 THE COURT: Well, I agree that he has to prove he
24 was operating a Ponzi scheme because the transfers have be
25 made in connection with the Ponzi scheme to get the Ponzi

1 scheme assumption, but it doesn't sound to me like he's got
2 to prove that Madoff was insolvent to compute net equity by
3 going back and figuring out what was really in the
4 transferor's account in the amount that was actually
5 credited to the transferee account. And, again, I use
6 transfer, and transferor, and transferee -- not in the sense
7 used in the Bankruptcy Code; just to describe what happened.
8 But, all right.

9 MR. JACOBS: Well, Your Honor, back in 2009, as
10 I'm sure you're aware, we negotiated with a large group of
11 defendants a procedures order that governs all of the good
12 faith actions; and in connection with that there was an
13 order entered that I refer to as the procedures order that
14 allows the Trustee to make available large amounts of data
15 through an electronic data room and could submit a summary
16 report of that information concerning relevant topics
17 through a summary or an expert report.

18 That's exactly what we've done with respect to the
19 Ponzi. As Ms. Chaitman knows, we have an expert named Mr.
20 Dubinsky, who offers a very comprehensive report on that
21 subject, and all of the data that he considered and utilized
22 in connection with his opinions have been made available to
23 every defendant through an electronic data room that
24 contains, approximately, 4 million records.

25 That report has not yet been served in the

1 Wilenitz matter, but a copy of that report has been served
2 to Ms. Chaitman on behalf of some of her other clients in
3 different proceedings. And in Section 4C of the procedures
4 order, that permits the Trustee to handle the voluminous
5 nature of discovery that's potentially relevant in this case
6 in that fashion.

7 THE COURT: Well, does Ms. Chaitman or any other -
8 - clients or any other defendant have the ability to look at
9 the same documents that your expert looked at and draw their
10 own conclusions?

11 MR. JACOBS: Absolutely. Every single document --
12 what we've endeavored to do, Your Honor, is that what we
13 refer to as Electronic Data Room 1 contains all of the
14 underlying documents considered by Mr. Dubinsky and we're
15 also building upon that in including documents that our
16 other experts who we may offer to prove transactions and who
17 do other functions, all of those documents as well. So,
18 that's approximately 4 million records. Not pages, but
19 records.

20 And it's an enormous amount of data that I believe
21 is unprecedented, at least in my career, and for that reason
22 we've structured the data room in a very organized fashion
23 with issue trees. So if you're a participant who's
24 accessing the data room, you'll see something that you might
25 be familiar with already in terms of like, an Outlook email

1 folder tree that has topics, broken down documents,
2 financials, third party records; and then each of those
3 trees can be broken down further to drill down to J.P.
4 Morgan statements. You know, Chicago Options Trading
5 information, Depository Trust Clearing Corporation
6 documents; all of those types of things. It's also
7 searchable.

8 So, absolutely the Defendant has the ability to
9 conduct whatever investigation they believe is relevant to
10 the claims of their defenses, the same that our expert did,
11 and they have access to all the same information that our
12 expert did. And we did that to be transparent and to
13 provide any data that any litigant believes that they should
14 have access to.

15 So, that's the starting point of where we are in
16 discovery. And then because Section 4C of the procedures
17 order allows us to provide a summary report, we do that.
18 And Mr. Dubinsky painstakingly analyzes the Ponzi scheme and
19 the IA business specifically, but also the other aspects of
20 BLMIS's businesses as well. And issues of insolvency are
21 also part of his analysis to the extent they may bear on the
22 Ponzi scheme or on other proofs we may have, or have had at
23 some point in our cases.

24 But all of the financials are considered, the
25 Ponzi scheme is considered, the stock-trading activity or

1 lack thereof in the IA business is considered, in addition
2 to the activities of House Five proprietary trading function
3 of BLMIS and the market-making function of BLMIS.

4 As the Court, I'm sure, is aware, Rule 26 of the
5 Federal Rules of Civil Procedure governs discovery and our
6 actions, and that rule was recently amended in December of
7 2015. The standard that discovery must be reasonably
8 calculated to lead to admissible evidence no longer exists
9 in the rule. It was specifically eliminated. And it was
10 replaced with language that says that discovery served must
11 be relevant and proportionate to the needs of the case. And
12 what does proportionate mean?

13 Section B1 actually lists factors that the Court
14 should consider in determining whether discovery is
15 proportionate, and those include, and I quote, "the
16 importance of the issues at stake in the litigation, the
17 amount in controversy, the parties' relative access to
18 information, the parties' resources, the importance of the
19 discovery in resolving the issues, and whether the burden or
20 expense of the proposed discovery outweigh its likely
21 benefit.

22 We submit, Your Honor, that upon an examination of
23 all 19 of these requests, the overwhelming majority of them
24 to begin with have no relevance to this litigation or these
25 claims.

1 THE COURT: Which ones do?

2 MR. JACOBS: There is a group of requests that
3 arguably have relevance to... And in discussions with Ms.
4 Chaitman yesterday I know that she believes they have
5 relevance to whether or not BLMIS was operating a Ponzi
6 scheme, and those are 13, 14, 15, 16, 17, and 18.

7 In addition to that there are three requests that
8 ask for the Trustee to identify any instance of a factual
9 error in any of BLMIS's books and records over any time
10 period, which are objectionable for a number of reasons I
11 would like to discuss with the Court Further -- but those
12 may arguably have relevance as well. Those are 2, 3, and 5.

13 But with respect to those requests in particular,
14 I would state for the Court that the Defendant in this
15 action submitted an affidavit in connection with her claim
16 stating that she had done a reconciliation of her customer
17 statements with her own bank accounts and that those bank
18 accounts confirmed that the customer statements for the
19 relevant accounts were accurate.

20 So, the issue of whether BLMIS's books and records
21 are accurate or inaccurate with respect to cash activity is
22 not an issue in dispute in this case.

23 THE COURT: Well, it is, though. It is. Because
24 at the end of the day, you have to prove the amount of the
25 fictitious profits, basically -- the extent of liability.

1 And that involves transfers that occurred long before the
2 two-year period. Were there transfers from other accounts
3 in this case? Interaccount transfers?

4 MR. JACOBS: There were interaccount transfers in
5 this case, Your Honor.

6 THE COURT: All right. You would have to prove
7 that the Trustee -- or those account transfers were
8 correctly computed.

9 MR. JACOBS: From a net equity perspective, we
10 absolutely agree, yes.

11 THE COURT: Yeah. So, all I'm saying is although
12 the claim only reaches back two years, you still have to
13 compute whether you call it net equity or fictitious
14 profits, that still has to be demonstrated so that you know
15 the scope of the liability.

16 MR. JACOBS: That's correct, Your Honor. And as
17 you may recall from the (indiscernible) trial, we submit
18 experts whose specific function is to do that.

19 THE COURT: Okay, but the Defendants are entitled
20 to see the data --

21 MR. JACOBS: That's absolutely right. And we have
22 already produced in this litigation, without even having
23 received a document request, 100 percent of that data. So
24 the Defendants have all of those records that we intend to
25 rely upon in order to prove both the net equity and to trace

1 the transfers.

2 THE COURT: So, you produce the records of other
3 accounts, for instance, the transferor accounts?

4 MR. JACOBS: We do, Your Honor. We call that our
5 initial disclosure production. In every case where there's
6 an interaccount transfer, we replicate our production of the
7 CADs, which I described earlier, for any related accounts.
8 And by related accounts, to be clear, in our mind that means
9 any account that transferred money to the sued upon account.
10 We do provide all of that documentation.

11 And also, the only additional possible discovery
12 that I believe would be relevant to the issues of transfers
13 and net equity are the Defendants' own bank records. And as
14 Your Honor I know is aware, this Defendant in addition to
15 others, have vigorously contested our right to those
16 documents. The Court has rejected those objections. That's
17 no longer an issue in this case, although I think we're
18 going to be talking about that in some others again later.

19 But in any event, our position is that the bank
20 records have limited utility. Our experts will submit
21 reports that detail exactly why BLMIS's books and records
22 are accurate and reliable for the cash activity, transaction
23 activity for every relevant account over the life of the
24 account. Those reports have not yet been submitted but I
25 can promise the Defendant and the Court that they will be

1 forthcoming in the expert phase of discovery in this case.

2 If it pleases the Court, I just would like to turn
3 to some of the other categories of request that are at issue
4 today. Well, first, let me finish my response to the
5 request that the Court asked about -- the small handful of
6 requests, maybe -- I'm bad at math on the spot but 6 to 8
7 that actually would potentially go to issues of the Ponzi
8 scheme.

9 THE COURT: You didn't list that as your arguably
10 relevant criteria.

11 MR. JACOBS: I'm sorry?

12 THE COURT: I asked you which of the requests were
13 arguably relevant.

14 MR. JACOBS: Right.

15 THE COURT: You told me 13 through 18 and maybe 2,
16 3, and 5 with a caveat.

17 MR. JACOBS: Correct. And to specifically further
18 address 13, 14, 15, 16, 17, and 18, there is one request
19 that asks for the Trustee in an interrogatory response to
20 set forth the basis of -- that BLMIS was insolvent over
21 every year going back to, I believe, 1982. Obviously, we
22 don't believe that is an appropriate request. The burden
23 clearly would not outweigh any likely benefit, given the
24 fact that --

25 THE COURT: Well, the Trustee has to prove...

1 Apparently, you agree with Ms. Chaitman that the Trustee has
2 to prove --

3 MR. JACOBS: To be clear on the record, I don't
4 agree with her characterization of our burdens of proof.
5 But Mr. (indiscernible) does address issues of insolvency in
6 BLMIS's financials in his report in painstaking detail. So,
7 to the extent that information is relevant or would be
8 relevant at any point in time, it's something that we
9 provided through the summary report, which the procedures
10 order allows us to do. And we've also made available all of
11 the underlying documentation that's referenced in that
12 report.

13 THE COURT: Okay. Have you produced the report,
14 the insolvency report?

15 MR. JACOBS: Not in this case, Your Honor. Not
16 yet. We are not yet in expert discovery. But Ms. Chaitman
17 does have a copy from other cases that are further advanced
18 and substantively the report --

19 THE COURT: It sounds like the basis of the
20 Trustee's opinion is the expert report.

21 MS. CHAITMAN: Do you want me to...?

22 THE COURT: Well, why don't you finish and then
23 we'll hear from you.

24 MR. JACOBS: Okay. So, that request, in essence,
25 we're saying is burdensome to the extent that she's asking

1 us to prematurely provide our report, we will provide our
2 report. Ms. Chaitman will have an opportunity to consider
3 all of the records our expert considers. She'll have an
4 opportunity to depose Mr. Dubinsky, although she hasn't yet
5 deposed him in any other case. And at a minimum, the
6 Defendants should have to start with the voluminous
7 discovery we've already provided before more is demanded.
8 And I think that is a principle that is expressly baked into
9 Rule 26, particularly in light of the recent amendment,
10 where the purpose of the amendment is to ensure that
11 litigants don't get to engage in endless and abuse of
12 discovery. And I think that that request falls into that
13 category of needless abuse of discovery, particularly given
14 everything we've already provided.

15 The same is true within that group of requests --
16 there are several requests that ask for stock trading
17 records for the market-making side of the business, and the
18 proprietary trading side of the business, and the IA side of
19 the business. However, our contention is there were no
20 stocks ever traded for any IA investment advisory customer.
21 And that request asks for that documentation going back to,
22 I believe, 1982.

23 Your Honor, the Wilenitz accounts were opened in
24 2003, so how can any stock trading activity for any part of
25 the business, however unconnected it may be to this

1 Defendant's IA account, have any relevance beyond 2003 as an
2 initial matter? But even with respect to the documents
3 post-2003, again, our expert report does a very
4 comprehensive analysis of how the AI business was conducting
5 a Ponzi scheme when those docs were traded.

6 THE COURT: Are you arguing that the requests are
7 irrelevant or that they're premature because they're really
8 expert discovery type requests?

9 MR. JACOBS: Both, Your Honor. I think that while
10 the relevance issue is murky -- I'm not contesting that that
11 request may be relevant; what I'm contesting is that the
12 request is not proportionate to the needs of the case. The
13 Defendant should have to make an explicit showing as to how
14 or why that particular discovery is needed. And, first and
15 foremost, they need to review and consider the voluminous
16 discovery precisely on that topic we've already provided.

17 So, for example, on my call with Ms. Chaitman
18 yesterday we tried to resolve some of these issues to
19 hopefully not burden the Court and we couldn't. But we
20 discussed that in 2014, we produced to Ms. Chaitman all of
21 the DTCC records that we had showing daily stock positions
22 at BLMIS -- any part of the business going back to 2002.
23 She has that information.

24 Apparently that didn't satisfy her, so she's
25 served this request, which clearly under the proportionality

1 standards of Rule 26, we should not have to answer. Because
2 it is the burden of the requesting party to show the
3 relevance of the request after an objection has been made.
4 So we're objecting that it's disproportionate to the needs
5 of the case, it's burdensome, it's of questionable relevance
6 because there's been no showing as to how that would further
7 the Defendant's ability to defend against our claims.

8 THE COURT: All right, let me hear from Ms.
9 Chaitman generally and then we'll go through each of the
10 requests. It's just easier to do it that way.

11 MS. CHAITMAN: Sure. If I can just begin, Your
12 Honor, by explaining one thing: I had proposed to Baker &
13 Hostetler a couple of months ago that we enter into a
14 consent order with respect to all of my cases -- it's a
15 little bit less than 100 -- that discovery served in one
16 case would be applicable in all cases. In other words, I
17 said, don't force me to serve 100 discovery demands that are
18 identical in all of my cases. Let's just agree that I can
19 serve them in any case but the demands and the responses and
20 any court rulings relating to those, unless there's a reason
21 to distinguish one defendant from another, would be
22 applicable in all cases.

23 They didn't get back to me on this. This would
24 simplify all of this a great deal. Otherwise, Your Honor,
25 we're all going to be burdened, you most of all. It's just

1 silly. And, you know, what I tried to do with this -- with
2 Wilenitz -- yes, every account is different, but the fact of
3 the matter is I represent defendants in 100 cases and we
4 ought to be able to do this in a reasonable way.

5 THE COURT: I don't disagree with you. I don't
6 want to do this 100 times. And nobody does, so...

7 MS. CHAITMAN: Exactly. So, may I submit to --

8 THE COURT: Well, have the same discovery requests
9 been served in every case?

10 MS. CHAITMAN: I haven't done it yet because I had
11 asked for a conference with you to try to resolve this.

12 THE COURT: Well, why don't we go through these
13 discovery requests and maybe we can pare down what you're
14 entitled to ask for in future cases, and this'll provide
15 some guidance in all the cases. The results can be the same
16 unless some case has a nuance -- like Wilenitz only goes
17 back to 2003; maybe some other case goes back to 1986 or
18 whatever.

19 MS. CHAITMAN: If I can say, Your Honor -- I'm
20 happy to go through these with you now, but I would like to
21 make a formal motion because --

22 THE COURT: A formal motion for what? To compel
23 discovery?

24 MS. CHAITMAN: Yes. Because it's important for
25 the record to contain an order. I mean, these go to

1 affirmative defenses that we have in the case. If, in fact,
2 the Court is not going to permit discovery on some of the
3 affirmative defenses, then in a sense, the Court is striking
4 an affirmative defense. And I think that in order to
5 protect the record, we ought to be able to go through the
6 process of a motion, briefing, and then a formal order.

7 THE COURT: Well, I'm not going to tell you can't
8 make a motion to compel discovery, but that said, maybe we
9 can go through these and we can talk about them.

10 MS. CHAITMAN: Okay.

11 THE COURT: Some of the argument that I'm getting
12 from Jacobs seems to suggest that discovery may be relevant
13 but it's really expert discovery. And that you should take
14 the deposition of the expert, ask he or she what she relied
15 on, and then ask for those documents, I guess. Although it
16 sounds like they've been produced or made available anyway.

17 MS. CHAITMAN: What I'm trying to flesh out, Your
18 Honor -- I think --

19 THE COURT: But the Trustee's not going to do your
20 work.

21 MS. CHAITMAN: I'm not asking the Trustee --

22 THE COURT: Well, but you are. For example, one
23 of these or maybe a couple of these said, "Identify every
24 instance in which there was an error in any account,"
25 putting aside the relevancy of that. You could do the same

1 analysis that the Trustee did and come up with --

2 MS. CHAITMAN: I couldn't possibly do it. What
3 I'm asking the Trustee to do, as you know from the profit
4 withdrawal issues, there's a great deal of question as to
5 the accuracy of the records. And the Trustee's own expert
6 has said that these records are riddled with fraud and that
7 they're not reliable. That was the basis of the Second
8 Circuit's ruling.

9 THE COURT: Now that the dollars are in and the
10 dollars are out, it would deem reliable by the Second
11 Circuit, because that was the basis of the net decision.

12 MS. CHAITMAN: But there was no factual record
13 before the Court. There was certainly no --

14 THE COURT: Let me ask the question -- putting
15 aside the profit withdrawal issue, if the records were
16 riddled with fraud but your records are right, your clients'
17 records are right, what difference does it make? Do you
18 think I'm going to draw an inference -- do you think I'm
19 going to try in every single case whether or not as a
20 general matter the records were accurate in every sense?

21 MS. CHAITMAN: Judge, here's the problem: Let's
22 just review the --

23 THE COURT: And Wilenitz agreed that he received
24 the --

25 MS. CHAITMAN: No, no, no, but Mr. Jacobs didn't

1 clarify what he was saying. For the period from 2000 on,
2 she had the bank records. And her SIPA claim said she
3 compared her bank records to the statements. But the
4 account predated that. This was --

5 MR. JACOBS: The accounts were opened in 2003,
6 Your Honor.

7 MS. CHAITMAN: But it was a successor account. It
8 had transfers into it from other accounts.

9 THE COURT: But they would've only occurred after
10 2003, right?

11 MS. CHAITMAN: No, the prior accounts were in the
12 1990s.

13 THE COURT: All right.

14 MS. CHAITMAN: So, if I can just explain...

15 THE COURT: I said, you are entitled to go back...
16 Any information relating to the computation of the amount of
17 fictitious profits. And if that involved transfers in old
18 accounts that went back to the 1980s, you're entitled to see
19 that. I don't dispute that.

20 MS. CHAITMAN: Right. But here's my point, Your
21 Honor: The DTC of trading records exists from 2002 on.
22 There is no evidence either way of trading prior to that.
23 No documentary evidence. With respect to third party bank
24 records, the J.P. Morgan Chase account records, the Trustee
25 has those from December 1998 on.

1 So, again, we have a vacuum of any third party
2 records which, in my opinion, are more reliable than
3 Madoff's records, for any transfers predating December 1998.
4 Now, the clients don't have these. First of all, a lot of
5 these clients received this money from someone else, through
6 an interaccount transfer, so it's not even that they can say
7 with personal knowledge that they recall or don't recall
8 something.

9 THE COURT: But I thought Mr. Jacob said --
10 basically, all of the data that you would need to answer
11 these interrogatories or I guess document requests,
12 whichever, have been provided.

13 MS. CHAITMAN: Your Honor, here's the thing:
14 There are, whatever, 4 million pages of documents in the e-
15 data room, but I want the Trustee to commit in writing to a
16 position which I can then use to either move to dismiss the
17 complaint because there'll be an utter failure or proof, or
18 whatever. I'm entitled to know whether...

19 First of all, he has no records other than
20 Madoff's own records. If in the course of his work as a
21 Trustee there have been 150 instances where he has concluded
22 that there were factual errors in the reports, you don't
23 think that that's important for you to know? Not
24 necessarily for Wilenitz but...

25 THE COURT: But if we're trying the Wilenitz case

1 and there are no factual errors vis-a-vis Wilenitz...

2 MS. CHAITMAN: But there are, because how does the
3 Trustee --

4 THE COURT: Well, fine. No, he could find that
5 out.

6 MS. CHAITMAN: No, no, no, but how does the
7 Trustee... The Trustee's going to come in and say that for
8 the period prior to December 1998, I'm relying on Madoff's
9 internal records.

10 THE COURT: Right.

11 MS. CHAITMAN: And he's refusing to tell me
12 whether he's found that Madoff's internal records are
13 reliable. We know, for example, one of his profit
14 withdrawal experts said that... Forgive me, but I don't
15 remember the exact number. I think the expert concluded
16 that there were 47 entries which were inconsistent with the
17 conclusion that he reached. And he concludes that that was
18 simply a mistake.

19 Well, okay. So, how many times in the records, in
20 Madoff's internal records were there mistakes?

21 THE COURT: Ms. Chaitman, I hear what you're
22 saying but I'm saying that unless the mistakes are in the
23 account of the particular adversary proceeding at issue, the
24 fact that there are mistakes in other accounts or other
25 records doesn't matter.

1 MS. CHAITMAN: But if you have no one with
2 personal knowledge, putting aside the rules of evidence,
3 which I think the Trustee can't even deal with, I don't
4 think the Trustee can even prove anything based on the rules
5 of evidence. But let's assume that you let it in, just for
6 the weight of it, okay? Let's say that -- how is Evelyn
7 Berezin Wilenitz, who inherited this account from her
8 deceased husband, how is she supposed to know whether he
9 realized there was a mistake in 1983 or whatever the year
10 was? It's impossible.

11 THE COURT: But you get the records...

12 MS. CHAITMAN: But what do we compare them
13 against?

14 THE COURT: How would we know there's a mistake
15 unless he's got two sets of records for the same
16 transaction, which indicates a mistake?

17 MS. CHAITMAN: What I'm saying is that the
18 profitable withdrawal expert for the Trustee concluded that
19 there were 47 or whatever it was mistakes in Madoff's
20 account records.

21 THE COURT: Were there any in the Wilenitz
22 account?

23 MS. CHAITMAN: No, because he was looking at a
24 different issue. But what I'm saying to you is that if
25 these reports were generated by people who were careless,

1 incompetent to do the job, deliberately motivated to
2 misrepresent what was going on in the transactions, that's
3 relevant.

4 THE COURT: So you can ask him at a deposition.
5 That sounds like expert discovery.

6 MS. CHAITMAN: No, because I'm... If the Trustee
7 -- if it's been brought to his attention that the internal
8 records are full of factual errors, I think he has an
9 obligation to disclose that.

10 THE COURT: I think I disagree. Let's go through
11 the request... As I said, you can make a motion to compel.
12 I can't tell you that you can't --

13 MS. CHAITMAN: Yeah, I'd like to at the end of
14 this, just so we have a clear record of what the rulings
15 are.

16 THE COURT: All right. With respect to one, list
17 the name and address... Well, I don't have to read it.
18 It's in there.

19 MS. CHAITMAN: Yeah.

20 THE COURT: I'm looking at Document 63-1.

21 MR. JACOBS: Right.

22 THE COURT: Is there an objection to that?

23 MR. JACOBS: Yes, Your Honor. This request is
24 like the other... As the Court pointed out with respect to
25 other requests, this request is essentially seeking our work

1 product.

2 THE COURT: That was my reaction when I saw it.

3 MR. JACOBS: And I explained to Ms. Chaitman on
4 the phone yesterday that, as she knows, there are
5 potentially upcoming depositions of BLMIS employees
6 happening in the PW context. She has a right to transcripts
7 of those depositions or to participate.

8 THE COURT: Does she have the right to ask you who
9 you spoke to? Forgetting about what they said.

10 MR. JACOBS: She absolutely doesn't. That's our
11 investigatory work product. And any mental impressions, or
12 memos, or notes that we took during our investigation are
13 work product that are shielded from discovery.

14 THE COURT: Certainly, when you asked for witness
15 statements, that sounded like Hickman v. Taylor, which was
16 the issue in that case.

17 MS. CHAITMAN: You know what, Judge? The reason I
18 want to brief that issue is that a SIPA trustee has specific
19 obligations to investigate the debtor and report to the
20 creditor body on what he finds. And I think that there's a
21 very strong issue there. This is not a typical adversary.
22 This is an adversary who's appointed pursuant to a federal
23 statute, which was intended to protect the customers.

24 THE COURT: Well, the same is true of a trustee,
25 as a representative of the estate.

1 MS. CHAITMAN: I know, but there are SIPA overlays
2 here. Let's just hypothesize that the Trustee has come to
3 realize that Madoff's internal records are completely
4 unreliable. Is he then allowed to conceal that information
5 from the Defendants and pursue discovery, asking the Court
6 to rely upon documents that the Trustee has already
7 determined are completely unreliable?

8 THE COURT: Isn't it really for me to determine
9 whether or not the records... I assume the Trustee is going
10 to try and prove the cases through the records, whether or
11 not the records are credible.

12 MS. CHAITMAN: Yes, but wouldn't you be -- you
13 wouldn't be influenced by the fact that the Trustee comes in
14 and says, I've determined -- I found 1,000 errors in this
15 body of documents?

16 THE COURT: Is it your position that the Trustee
17 can make no mistake in this case?

18 MS. CHAITMAN: It's not the Trustee's mistake;
19 it's the Madoff records...

20 THE COURT: No. No. Yes, the Trustee has
21 statutory duties under SIPA, but the Trustee is also a
22 litigant. And I don't think that either as a claim
23 determining person, who's certainly following an objection,
24 or as a plaintiff in an adversary proceeding, that the
25 Trustee has additional duties beyond the ordinary litigation

1 duties to bear his soul and to file a complaint and say, you
2 know, I really don't think that I have a claim here but I'm
3 going to file it.

4 But in any event, I agree that Number 1 sounds
5 like it's work product, assuming it's material prepared in
6 anticipation of litigation, and I realize the Trustee has
7 certain SIPA duties to do this without regard to litigation,
8 but also has litigation duties and it's...

9 MS. CHAITMAN: All right, so I'd like to brief
10 that issue, Your Honor. And Number 2 goes to the same
11 issue.

12 THE COURT: Let me just read this. I think Number
13 2 is irrelevant and goes beyond the proportionality
14 standards -- the new rules. If the records in your case are
15 right, it doesn't matter if the other records are wrong.
16 And if the records in your case are wrong, it doesn't matter
17 that all the other records are right. It's about your case
18 that we're trying.

19 MS. CHAITMAN: But, Your Honor --

20 THE COURT: And I don't think that under the
21 federal rules of evidence I can draw -- infer a pattern and
22 practice of negligence or improper record-keeping, which is
23 really what you're asking me to do.

24 MS. CHAITMAN: Well, I think what I'd like to do
25 is put this in a motion and lay out the rules of evidence.

1 Because when you compare what the rules of evidence permit
2 with -- it's unusual in my experience for a trustee to be
3 relying upon records that go back as far as these records,
4 that were prepared in connection with a Ponzi scheme by
5 people who were either obviously criminals or paid to
6 overlook what they were seeing.

7 THE COURT: You know -- and maybe this motion that
8 you're contemplating would be a good way to narrow the
9 overall scope of discovery... By the way, again, I come
10 back to the point that I don't think solvency is relevant.
11 And if you want to set up some sort of omnibus procedure and
12 maybe we can just cut those -- not out of all these cases.
13 I may be wrong but this is an intentional fraudulent
14 transferred case; solvency or insolvency is simply not
15 relevant. It's not an element of the claim.

16 MR. JACOBS: Right. Your Honor, may I confer
17 internally with my colleagues, and can we get back to the
18 Court about that proposal, which makes perfect sense?

19 THE COURT: Yeah, I'm just throwing that one out.
20 Three, again, it's the same thing -- it's errors in other
21 persons' accounts. And it sounds to me that at the end of
22 the day, the Trustee has produced all this information
23 anyway. So, you can do the same analysis, can't you?

24 MS. CHAITMAN: How would we know, Your Honor, if
25 there was a mistake in a statement that was prepared in

1 1983?

2 THE COURT: Well, how would the Trustee know?

3 MS. CHAITMAN: Because he might have found
4 conflicting evidence. In fact, as I said, as one example,
5 his expert on the profit withdrawal issue said that there
6 were, I think, 47 entries which were inconsistent, and he's
7 concluded that those were mistakes.

8 THE COURT: Right. So, the expert's -- and you'll
9 get all of the entries the expert looked at and you'll get
10 the account statements, and you can do the same analysis.

11 MS. CHAITMAN: But that's limiting... Then I'm
12 only getting what the expert got. And there may be a whole
13 body of evidence which disproves the expert's conclusions.

14 THE COURT: That's speculative. But I think that
15 maybe in response to the motion I have to understand what's
16 in the data room, and what's being produced. I know that
17 you've told me it many times.

18 MR. JACOBS: Yes.

19 THE COURT: And it kind of rolls over my head
20 sometimes. But I mean, the bottom line is if you can do the
21 same analysis with the same data, because --

22 MS. CHAITMAN: I can't.

23 THE COURT: Let me just finish. Then why does the
24 Trustee have to do this? Putting aside the relevance
25 questions.

1 MS. CHAITMAN: Because the Trustee is in a unique
2 position to have investigated the Debtor with, you know,
3 hundreds of millions of dollars of expert assistance, and he
4 has unique access to the employees, and he has the ability
5 to know information that there's no way I could ever
6 duplicate.

7 THE COURT: Like what? I mean, it might take time
8 and money, I understand that, but I just don't understand --

9 MS. CHAITMAN: Like someone coming in and saying,
10 you know, we falsified these entries. We just made them up.
11 Because some of these --

12 THE COURT: Well, obviously, they're all false.

13 MS. CHAITMAN: Well, you're saying the deposits
14 and withdrawals --

15 THE COURT: Right, those are not.

16 MS. CHAITMAN: Okay. But what I'm saying to you
17 is it may very well be... I happen to believe, based on
18 what people have told me, certainly with respect to the
19 profit withdrawals, that these were not received. They may
20 have been received by somebody else but they weren't
21 received by the customers.

22 THE COURT: Well, then the customer denies that
23 they received it. I just... You know, you're certainly
24 entitled to know whether the records regarding the
25 particular defendant are correct, but if there was a mistake

1 or a phony record on somebody else's account in 1986, I just
2 don't... It's just not relevant. And, as I said, you can
3 probably do the same analysis anyway.

4 Number 4 is the same thing. A lot of this is in,
5 what is it, the Calura report or the Greenblatt report?

6 MR. JACOBS: Well, both of those reports cross-
7 reference each other, so I tend to view it, personally at
8 least, as a comprehensive report. But the issue with PW
9 here, Your Honor, is that obviously the request is seeking
10 that documentation across the entire body of customer
11 accounts, right, at all periods in time, and as a --

12 THE COURT: Let me ask you a question, though, on
13 this one. Does Wilenitz have any profit withdrawal...?

14 MR. JACOBS: It does not. Not in this --

15 THE COURT: Well, how can you ask for that in this
16 case?

17 MS. CHAITMAN: I think that, first of all, what I
18 intended to do, Your Honor, was have one set of
19 interrogatories that would cover all of my clients.

20 THE COURT: But in this case -- you're telling me
21 you're going to make a motion to compel.

22 MR. JACOBS: Right.

23 THE COURT: Are you going to make a motion to
24 compel on Question Number 4, where there are no PW entries
25 in this particular defendant's...?

1 MS. CHAITMAN: I need to go back. I don't recall
2 at this moment whether the predecessor account had PW
3 entries.

4 THE COURT: Okay, fair enough.

5 MR. JACOBS: The predecessor accounts did not have
6 any PW actions. I checked that in preparation for this
7 hearing.

8 THE COURT: All right. Well, she's entitled to
9 check that and --

10 MR. JACOBS: But, Your Honor --

11 THE COURT: (indiscernible) have been made
12 available.

13 MR. JACOBS: But this illustrates nicely the exact
14 reason why a standing order allowing discovery served by Ms.
15 Chaitman to apply in every single case just can't possibly
16 be workable.

17 THE COURT: Well, I don't want to go through this
18 100 times.

19 MR. JACOBS: I agree, Your Honor. And if I may,
20 you know, the protective order that Your Honor issued in the
21 Nelson cases regarding discovery served, which is at issue
22 here as well, concerning the Trustee's compensation, is a
23 perfect example. And I had a call with Ms. Chaitman
24 yesterday where I said, I understand you want to preserve
25 that issue in all of your cases. We'll stipulate to that so

1 that it doesn't need to be re-litigated. But we're
2 litigating in two District Courts. We've litigated it here.
3 We've litigated it before Judge (indiscernible). We've
4 litigated it before Judge Rakoff. There has to be an end at
5 some point to litigation on the same issue.

6 So, we're happy to stipulate as orders are
7 entered, and I understand the Defendant's desire to want to
8 preserve their right to appeal. We have no objection to
9 that. But we can't have a standing order that everything in
10 one case applies to the other.

11 I also asked Ms. Chaitman, based on my
12 representation that we would stipulate to that effect, that
13 she withdraw this discovery and she refused. So here we are
14 having yet another hearing.

15 THE COURT: Why don't we get back to the requests?

16 MS. CHAITMAN: Which one are you up to now?

17 THE COURT: Five.

18 MS. CHAITMAN: You're up to five?

19 THE COURT: I mean, I don't even know what that
20 means. But it's more of this kind of all of the records
21 type thing. I'll decide whether or not the records
22 accurately prove that the Trustee has to prove in a
23 particular --

24 MR. JACOBS: In this request, Your Honor, Ms.
25 Chaitman raises this "riddled with fraud" accusation in

1 various contexts.

2 THE COURT: It's (indiscernible)...

3 MR. JACOBS: I have no idea.

4 MS. CHAITMAN: It's from the original Dubinsky
5 report.

6 MR. JACOBS: I checked that report. I was not
7 able to find it there. So, to me, this request --

8 THE COURT: You can't do a text search? It's text
9 searchable, isn't it?

10 MR. JACOBS: It is. It's a PDF text-searchable
11 report. I checked both the earlier report and the current
12 report, which has been revised. I couldn't find it. But I
13 mean, this request to me is also in addition objectionable
14 for that reason. It's just nonsensical. I mean, how do I
15 even respond to this?

16 THE COURT: I agree. Number 6...why do you have
17 to know every customer whose claim has not been paid? Ms.
18 Chaitman?

19 MS. CHAITMAN: I have a series of questions which
20 go to this issue, Your Honor.

21 THE COURT: Well, I understand the argument,
22 although I've dealt with it already, about the Trustee's
23 standing. Is that what this is going to?

24 MS. CHAITMAN: No. The net equity decision was
25 rendered without any factual record. And I want to have in

1 the record the facts with respect to, as of this point in
2 time, what claims have been paid in full, what claims have
3 not been paid in full, and what claims have been sold.

4 THE COURT: How is that relevant to the Wilenitz
5 case?

6 MS. CHAITMAN: Well, it's relevant to all of the
7 cases because --

8 THE COURT: Well, let's deal with Wilenitz. This
9 is a discovery request. And in every case, even if you use
10 the same discovery, it's going to have to be relevant for
11 that particular case.

12 MS. CHAITMAN: Right.

13 THE COURT: So, how is that relevant to Wilenitz?

14 MS. CHAITMAN: It's relevant to all the cases
15 because I think that the net equity decision was based upon
16 certain misconceptions of what the factual record would
17 ultimately show. We have never had an opportunity to go to
18 the Second Circuit with a developed factual record, and I'm
19 anticipating that we will have that opportunity at the end
20 of these adversary proceedings.

21 THE COURT: Well, you're not going to use this
22 adversary proceeding to create a record to go back and
23 seek... It's probably too late now, but some sort of
24 reconsideration --

25 MS. CHAITMAN: No, but certainly with respect to

1 whether it's appropriate to allow a SIPA trustee to claw
2 back from innocent customers. That is an issue the Second
3 Circuit has not yet determined, and I think that it's
4 relevant for the Second Circuit to know the facts about who
5 the claimants are, how many claims have been sold and are
6 owned by hedge funds or other speculative organizations...

7 THE COURT: Why is that relevant to whether or not
8 Wilenitz is liable for fraudulent transfer?

9 MS. CHAITMAN: Because, in my opinion, the Ponzi
10 scheme exception to the affirmative defense, which has
11 existed in fraudulent transfer law since Elizabeth I -- that
12 is that you cannot recover an intentional fraudulent
13 transfer from a creditor who takes in good faith on account
14 of an antecedent debt.

15 THE COURT: And for value.

16 MS. CHAITMAN: And for value. And it's
17 indisputable that a customer of an SEC regulated broker is a
18 creditor of the broker -- just as if you have a bank account
19 at Chase Manhattan Bank, that you have a debtor creditor --

20 THE COURT: No question your clients would
21 probably defraud it.

22 MS. CHAITMAN: No, no, no, it's not a question
23 defraud it. They were good faith creditors who took
24 withdrawals on account of an antecedent debt.

25 THE COURT: Well, but that issue's been litigated,

1 and in every --

2 MS. CHAITMAN: But --

3 THE COURT: Let me finish. In every Ponzi scheme
4 case that I've seen, SIPA and non-SIPA, fictitious profits
5 are just not valued. So, even if there was an obligation to
6 restore the principal or whatever, you don't pay value for
7 fictitious profits.

8 MS. CHAITMAN: Well, there are two comments on
9 that, Your Honor. I think that you may be grouping together
10 cases where someone was an equity investor in a Ponzi scheme
11 and cases where someone was a good faith creditor of a Ponzi
12 schemer. And I think that the law should be different with
13 respect to those two categories. And I think that the first
14 statute, Elizabeth in 1571, recognized that difference.
15 That difference is incorporated into the Bankruptcy Code,
16 it's incorporated into the state fraudulent transfer -- the
17 Uniform Fraudulent Transfer Law. And, in fact, both the
18 Minnesota Supreme Court and the Texas Supreme Court have now
19 held that it doesn't matter whether it's a Ponzi scheme; if
20 the creditor has given value and takes the money in good
21 faith, it's not recoverable as a clawback.

22 THE COURT: If you're talking about the
23 (indiscernible) case in the Supreme Court in Texas, I rode
24 that decision, and that's a creditor who provided dollar for
25 dollar value in terms of advertising for whatever it was

1 paid, and it happened to be paid in a Ponzi scheme. But you
2 don't provide dollar for dollar value for fictitious
3 profits, and that's the difference.

4 But look, I hear you. Make your motion. I'm
5 probably going to deny it because it's not relevant to
6 whether or not Wilenitz is liable for a fraudulent transfer.
7 Okay? Number 7. This is a similar type of request.

8 MR. JACOBS: Yes, Your Honor. I think 6, 7, 8,
9 and 9 all relate to the claims activities. Some of the
10 requests purport to demand us to produce documentation on
11 behalf of the Madoff Victims Fund, which is separately
12 administered by the Department of Justice. The Trustee has
13 no legal responsibility for the administration of that fund,
14 which goes well beyond claims of SIPA customers. So that
15 obviously is completely objectionable, and we couldn't
16 comply even if we were ordered.

17 And, generally, I do believe that these requests,
18 6, 7 -- the unnumbered request, and 8 and 9...

19 THE COURT: Which is unnumbered? What page is it?

20 MR. JACOBS: It's between 7 and 8.

21 THE COURT: Oh, I see, I see. Yeah, between 7 and
22 8.

23 MR. JACOBS: I do believe that these are seeking
24 discovery and furtherance of the standing issue that this
25 court rejected in omnibus decisions on the motions to

1 dismiss --

2 THE COURT: Well, that's what I thought.

3 MR. JACOBS: And discovery should additionally be
4 prohibited on that basis as well, Your Honor. You analyzed
5 the law very meticulously, and I believe you didn't reach
6 the issue of whether the sufficiency of the customer fund is
7 determined as of the filing date for purposes of the
8 statute. However, you did note that there is controlling
9 law in this jurisdiction stating that it is. And,
10 furthermore, you found it's a factual --

11 THE COURT: Oh, I was adding (indiscernible)...

12 MR. JACOBS: Correct. Persuasive law.

13 THE COURT: Judge Rakoff adopted it.

14 MR. JACOBS: Right. And in addition to that, as a
15 factual matter, you did find that the Trustee does have
16 insufficient funds. And I can reiterate to you, as I
17 believe you recently heard in our last omnibus update, to
18 date we've recovered, approximately, 11.1 billion.

19 THE COURT: Well, you can certainly tell her the
20 aggregate number because it's in the report. I think
21 it's... Let me just see. You can give her the aggregate
22 number of assets you had, and claims you paid, and unpaid
23 claims because it's arguably relevant. I didn't really
24 decide the issue; I just... Based on everything I had seen,
25 it looked like -- and even the Second Circuit agreed that it

1 looked like the estate was insolvent.

2 MR. JACOBS: Right. I understand, Your Honor.

3 And, in fact, I think there's public interest in that
4 information as well. And as we respond in each and every
5 discovery request --

6 THE COURT: And it's in your report anyway.

7 MR. JACOBS: It's in our reports. It's also on
8 our website, which is regularly updated, madofftrustee.com.

9 THE COURT: And so you agree she could get that
10 information. Let's move on to... Let's get off of what we
11 agree with.

12 MR. JACOBS: All right.

13 THE COURT: The question regarding Picard's
14 compensation we dealt with already.

15 MS. CHAITMAN: Yeah, okay, but see, here's another
16 thing, Your Honor. Unless and until we have an order saying
17 --

18 THE COURT: There is an order. It was the omnibus
19 motion order in all these adversary proceedings. We covered
20 that issue. You preserve that issue.

21 MS. CHAITMAN: Okay. But, for example, with the
22 subpoenas we're having the same issue. We don't have an
23 order which says, I've held in the Sarah Lawrence case that
24 -- there's no defense to the subpoenas, and that's
25 applicable in all these other cases. I need to have that in

1 the record.

2 THE COURT: It's applicable to all the cases.

3 MS. CHAITMAN: Okay, can I submit an order on
4 that?

5 THE COURT: It's already embodied in the order in
6 the omnibus motion, isn't it?

7 MS. CHAITMAN: I don't believe so, Your Honor.

8 MR. JACOBS: I think Ms. Chaitman is raising an
9 additional issue. The Rule 45 bank subpoenas that we
10 litigated in Wilenitz and Sarah Lawrence --

11 THE COURT: Well, I was talking about this issue
12 with Mr. Picard's company --

13 MR. JACOBS: That is absolutely correct. I agree
14 with Your Honor. It is made applicable to every proceeding
15 by your decision in the omnibus proceeding.

16 THE COURT: Well, the only thing I would say with
17 the bank --

18 MS. CHAITMAN: But the Trustee objected --

19 THE COURT: Stop. The only thing I would say with
20 the bank subpoenas is if a defendant admits that they
21 received the particular transfers and the amounts are
22 accurate, then I might conclude that there's no entitlement
23 to the bank records based on the position the Trustee's
24 taken. But every one of these responses to requests for
25 admission say, it's accurate but we didn't receive it, or

1 it's accurate to the extent it agrees with the records of
2 our accountants, and those are not answers.

3 That's the issue I have. If you just say, yeah,
4 they're accurate, then they're accurate.

5 MS. CHAITMAN: You allowed subpoenas to be served
6 in cases where there were blanket admissions as to --

7 THE COURT: That is not correct.

8 MR. JACOBS: That is factually incorrect, Your
9 Honor.

10 THE COURT: You can show me and I will reconsider
11 it, but --

12 MS. CHAITMAN: Well, the documents have been
13 produced but --

14 THE COURT: I went through every one of those
15 requests and Sarah Lawrence was in a different position
16 because Sarah Lawrence said, they're right to the extent
17 they agree with the reference my account takes.

18 MS. CHAITMAN: Right.

19 THE COURT: Others said, yes, they accurately
20 reflect what I put in, or something like that, and what came
21 out, but I didn't receive them. You know, it was that kind
22 of stuff.

23 MR. JACOBS: That was the Wilenitz matter.

24 THE COURT: That was in a lot of them; it wasn't
25 just Wilenitz. And then, you know, it just makes it more

1 difficult.

2 MS. CHAITMAN: So you want to do those on a one by
3 one basis?

4 THE COURT: Well, if you are... I'll continue to
5 go through them one on one, but I will tell you that if I
6 see those kind of answers, that's going to be the end of it.
7 All right, next is --

8 MS. CHAITMAN: Can we go to one other thing, if I
9 can just interject?

10 THE COURT: Sure.

11 MS. CHAITMAN: Because this came up with a lot of
12 the subpoenas. You had entered an order in Sarah Lawrence
13 that if there was a subpoena to which I objected, I would
14 ask for a meet and confer, and the subpoena would not be
15 served until you -- if the meet and confer was unsuccessful,
16 which of course it would be, we would then ask for a
17 conference and until you resolved it, the Trustee would not
18 serve the subpoena.

19 THE COURT: No, these were subpoenas that were
20 served already because you were seeking protection from the
21 subpoenas. The Trustee said he was going to serve
22 subpoenas; he was concerned about (indiscernible). And then
23 the original, I don't want to say agreement, but the
24 original proposal that either before or after these were
25 served, the Trustee would send either a request for

1 admission or proposed stipulations regarding the withdrawals
2 and the deposits into the account during, I guess, the two-
3 year period or the three-year period, whatever it was. You
4 weren't being asked to stipulate to all of the withdrawals
5 and deposits.

6 And if you admitted that they were accurate, then
7 that was it; he didn't need the records. But if you didn't
8 admit that they were accurate or there was some issue
9 relating to an affirmative defense, then he would need the
10 records.

11 In terms of the procedure that I thought was being
12 set up, you'd confer -- and that just seems to be futile at
13 this point because we're not getting anywhere with
14 conferring. If it couldn't be resolved, you'd immediately
15 write me a letter and hold a conference like this, and I'd
16 resolve it. But that just wasn't working.

17 MS. CHAITMAN: But what's happened is that the
18 Trustee is now serving subpoenas before he even serves
19 discovery demands, or at the same time that he serves
20 discovery demands, so that my clients are not even given an
21 opportunity to admit or deny the transfer...

22 MR. JACOBS: Your Honor, may I address that?

23 THE COURT: Yes.

24 MR. JACOBS: The Defendants have an opportunity to
25 admit to the transfers in their answer. And any day of the

1 week we will accept an amended answer that admits to those
2 factual issues. There is no obligation in the federal rules
3 that discovery be served in any particular order. Given the
4 history, as the Court very aptly notes, with Ms. Chaitman on
5 these cases and the needless litigation that has occurred on
6 this issue, yes, we are serving bank subpoenas at the
7 earliest possible date. Because these are delay tactics,
8 it's causing unnecessary litigation, and the documents are
9 being destroyed. And I know that the Defendants will use
10 the destruction of those documents against us, as Ms.
11 Chaitman has alluded to earlier today, and making
12 allegations we can't prove our cases.

13 THE COURT: I'm not going to tell the Trustee that
14 he can't serve subpoenas. If there's a subpoena served,
15 there's nothing that stops you from amending the answer or
16 just submitting an affidavit that says, yeah, I agree that
17 these are the deposits, and these are the withdrawals, and
18 either the schedule that's attached to the complaint or
19 whatever paragraph it's alleged in.

20 MR. JACOBS: And I will reiterate, we are happy to
21 receive that on an unambiguous stipulation or omitted answer
22 any day of the week and we will scale a discovery.

23 THE COURT: It just hasn't worked and I don't want
24 to go through that again. It just hasn't worked. Ten
25 relates to the Court's compensation arrangement, 11 relates

1 to the Court's compensation...

2 MS. CHAITMAN: Right, and 12 does.

3 THE COURT: Well, 12 relates to other attorneys'
4 compensation. And I go with that in the omnibus decision --

5 MS. CHAITMAN: Right. Okay. So, 13...

6 THE COURT: I think that the Trustee supplied the
7 list, didn't you?

8 MR. JACOBS: We did supply --

9 MS. CHAITMAN: He supplied the list but it was a
10 list of all the employees; it didn't break it down by
11 what...

12 MR. JACOBS: That's not correct, Your Honor. We
13 responded to this... I don't believe we had to --

14 THE COURT: Where is that attached?

15 MR. JACOBS: It's attached to our responses to
16 these requests that we attached to our letter, which is
17 dated May 4th. That's the list that has every employee that
18 we could identify making a reasonable search --

19 THE COURT: Do you have a list that -- not
20 creating a list, but do you have a list that breaks down
21 which of the divisions the employee worked for?

22 MR. JACOBS: We do and we've provided it
23 specifically.

24 THE COURT: Where?

25 MR. JACOBS: And here's the issue: I don't

1 believe it's before the Court in any of the party's filings,
2 but all of that documentation is in the data room, which is
3 our objection to having to even respond to the request.

4 THE COURT: Well, if it's in the data room -- I
5 mean, even if she makes a motion to compel, if you'd
6 convince me that it's been turned over or made available --

7 MR. JACOBS: It has. We endeavored to
8 specifically -- we identified for Ms. Chaitman the payroll
9 records for January 2008 that list all of the employees,
10 which was part of the request; we identified an internal
11 BLMIS list, which breaks out each employee by their
12 division; and then she objected that we hadn't given her
13 addresses and phone numbers, so we endeavored to compile the
14 list that you see attached to our responses and our May 4th
15 letter, which is before you now. That's a list we were able
16 to create upon a reasonable search to the best of our
17 knowledge.

18 THE COURT: And as I understand it, you provided a
19 list, which identifies which of the employees work for which
20 division?

21 MR. JACOBS: We did. It already was in the data
22 room and always available to Ms. Chaitman. We reproduced it
23 and identified it by Bates Number.

24 THE COURT: Ms. Chaitman, you've got to look at
25 this stuff before you --

1 MS. CHAITMAN: Yeah, I did. I will go back and
2 look at it again. I do not believe that it broke it down
3 that way, but I will look at it.

4 THE COURT: All right. 14 I think is permissible.
5 That goes back to the computation of net equity, which is
6 basically the same as the computation of fictitious profits.

7 MR. JACOBS: Right.

8 THE COURT: And, you know, she's entitled to
9 inquire to how you computed the net equity in a particular
10 account. Now, it may make sense -- I don't know how you're
11 going to do this with one expert and however many cases you
12 have at this point, but she's certainly entitled to ask how
13 did you compute the net equity in the transferor account
14 back in whenever it was.

15 MR. JACOBS: I don't disagree, Your Honor. That's
16 a subject of expert reports that will be proffered in expert
17 discovery. There are three.

18 THE COURT: Yeah, I mean, some of this may be
19 relevant but premature. That's all I'm suggesting.

20 MS. CHAITMAN: But why do I have to wait for an
21 expert report? This is a factual issue. I don't even think
22 --

23 THE COURT: But you've gotten the information
24 already.

25 MR. JACOBS: We've produced 100 percent of the

1 underlying documentation.

2 THE COURT: It's been produced. If you want to go
3 and do it... My response is if it's been produced and you
4 can make this determination, then go ahead and make it.

5 MS. CHAITMAN: It hasn't been, Your Honor. Again,
6 we're dealing with the period prior to December 1998, when
7 there are no checks. So, how can an expert testify that
8 something was deposited --

9 THE COURT: But that's his problem. He can only
10 produce what he has.

11 MS. CHAITMAN: But the point is -- he didn't say
12 here that he's not producing it because he doesn't have it.
13 If that were in the record, it would be different. He's
14 objecting to producing it.

15 MR. JACOBS: I'm objecting to this request in its
16 current form as being burdensome under the proportionality
17 standards of Rule 26 when, by court order, we are permitted
18 to provide all of the underlying documentation and an expert
19 summary report on this exact issue, which we have done and
20 we will do.

21 THE COURT: As I had said, if you have provided
22 the information or provided access to the information,
23 that's --

24 MS. CHAITMAN: Right, and if Ms. Chaitman believes
25 there are holes in the records or incomplete analyses, she

1 is more than able to examine those experts and conduct
2 expert discovery on those exact issues at that time. But
3 until she has raised a bona fide dispute, I don't believe
4 that Rule 26 entitles defendants to blanket discovery on
5 broad issues like this without a demonstration of the need
6 under the proportionality standards of the rule.

7 MS. CHAITMAN: Judge?

8 THE COURT: Yeah?

9 MS. CHAITMAN: This is not proportionality. The
10 Trustee's going to come in and say that even Berezin
11 Wilenitz has a negative net equity based on transactions
12 which occurred prior to December 1998...

13 THE COURT: I agree with you. But he's saying
14 he's produced that information.

15 MS. CHAITMAN: But no, they don't have the
16 information. What he's saying is his expert is going to
17 say, you know, I conclude --

18 THE COURT: Does he have to tell you what he
19 doesn't have, or does he have to simply say, I will produce
20 everything that I have that's responsive to this request?
21 And then you ask the expert at a deposition, you know, what
22 records did you review? Did you review -- did you compare
23 the account statements in 1998 with bank statements? And
24 he'll say, well, I didn't have any bank statements. And
25 then you can raise that at trial -- that his report, in

1 terms of the computation of net equity in the transfer
2 account is not accurate and, therefore, you can't know what
3 the fictitious profits were, if any, that he's suing for in
4 this case.

5 MS. CHAITMAN: Okay. I mean, it just delays the
6 process. Because I believe that I would be entitled to
7 dismiss all of the complaints where the Trustee has no third
8 party records to prove... Just as a matter of the rules of
9 evidence, you can't prove a payment to someone through an
10 expert report.

11 THE COURT: Well, I don't know how the expert...
12 If the expert had no records, I don't know how the expert
13 came up with the report. So, obviously, the expert has some
14 records and is probably extrapolating --

15 MS. CHAITMAN: The expert has Madoff statements.

16 THE COURT: I agree with you... Let me just
17 finish it off on this. I agree with you that you were
18 entitled to inquire into the computation of fictitious
19 profits, which may go back to the beginning of time. On the
20 other hand, the Trustee can only produce what he has. I'm
21 told the Trustee has made that available. And then the next
22 step is to ask the expert what he relied on and what he
23 didn't have to determine what the gaps are in the evidence
24 if you can't determine it from what the Trustee's produced.

25 If you are concerned that the Trustee is suddenly

1 going to show up with records that he didn't produce, you
2 know, that's true in every case. And then I guess we'll
3 have a fight over whether or not these documents were ever
4 made available to you. Let's move on.

5 15 is this insolvency issue. And maybe in
6 response to the motion to compel...well, I guess there are
7 other lawyers involved on this issue.

8 MR. JACOBS: Yes. And I would...

9 THE COURT: Maybe it's a good omnibus issue.

10 MR. JACOBS: Yes, I believe that you suggested
11 that earlier and I think we would love to confer about that.

12 THE COURT: Except in certain streamlined cases,
13 if insolvency is irrelevant. I remember when I saw this
14 issue, it just struck me that it's irrelevant in an
15 intentional fraudulent transfer case.

16 MS. CHAITMAN: Okay, so, 16, Your Honor, goes to
17 the issue that I had raised with you once and you said you
18 were familiar with --

19 THE COURT: I thought that information has been
20 provided already, though. Didn't you provide the DTC
21 records?

22 MR. JACOBS: We have, Your Honor, going back to
23 2002 -- maybe it was 2003; I'd need to check, but one of
24 those two years for sure.

25 THE COURT: Is that the last year or the first

1 year that you have records?

2 MR. JACOBS: Yeah. So, what we did -- because I
3 think it's helpful, I'd love to explain very briefly -- we
4 did rule 2004 subpoena DTC. They produced records to us.
5 Ms. Chaitman has copies of those productions. We also
6 restored all of the live data on the active DTC terminal
7 that BLMIS used. Ms. Chaitman has all of that data.

8 DTC had also made a similar production to the SEC;
9 Ms. Chaitman also has a copy of that production. And,
10 collectively, those records show daily trading positions
11 going back to 2002.

12 THE COURT: So, what more do you need?

13 MS. CHAITMAN: Your Honor, let's just hypothesize
14 we're talking about someone whose net equity is calculated
15 over a period beginning in 1982, okay? The only way, in my
16 opinion, that the Trustee could conceivably be entitled to
17 this Ponzi scheme presumption, which would allow him to void
18 transfers going back to 1982, is if Madoff was operating a
19 Ponzi scheme in 1982.

20 THE COURT: Right.

21 MS. CHAITMAN: And I'm entitled -- let's assume,
22 for example, that he had 200 employees, six of them were
23 involved in the Ponzi scheme, 194 of them were involved in a
24 legitimate trading business, and the legitimate trading
25 business did \$16 trillion, and the Ponzi scheme in 1982 did

1 half a million.

2 THE COURT: Mm hmm.

3 MS. CHAITMAN: You could very reasonably determine
4 that the Ponzi scheme presumption cannot apply to that year.

5 THE COURT: Okay. I'm not arguing with you but I
6 thought that whatever records they had had been turned over.

7 MS. CHAITMAN: No, they have internal records that
8 they have not turned over. They have monthly reports as to
9 what the trading volume was in the market making unit, in
10 the investment advisory unit, and in the --

11 THE COURT: Well, the investment advisory but
12 there's no trader.

13 MS. CHAITMAN: Excuse me, I mean the market making
14 and the proprietary trading.

15 MR. JACOBS: We have turned over everything that
16 we have. We scoured the ends of the earth, we have been in
17 discussion with DTC to try to find out if there are more
18 documents. Ms. Chaitman subpoenaed DTC. She obviously has
19 subpoena power. She can go out into the world and conduct
20 third-party discovery...

21 THE COURT: Okay, but she's entitled also to ask
22 you what documents you have.

23 MR. JACOBS: Your Honor, we didn't make 4 million
24 records available because we're trying to hide anything. We
25 have made everything we have available within the parameters

1 of what is readily accessible and reasonable under the
2 federal rules of civil procedure. Well beyond that. But we
3 have made everything on this issue that we have available.

4 And, again, Mr. Dubinsky in his report, as Ms.
5 Chaitman knows, again, it hasn't been served here yet --
6 goes through a painstaking analysis of how the IA business
7 never conducted trades. It also goes through a painstaking
8 analysis of how cash infusions from the Ponzi scheme propped
9 up House Five, which is the --

10 THE COURT: Right, but she's still entitled to the
11 records.

12 MR. JACOBS: She has all of the records.

13 THE COURT: All right, then if she has them, she
14 has them.

15 MS. CHAITMAN: Well, why can't he -- if he claims
16 that there are monthly reports for the legitimate trading
17 units, why can't he just give me the Bates Numbers? Why do
18 I have to go on a fishing expedition through 4 million pages
19 of documents and then come back and say, they're not here?

20 THE COURT: Wouldn't he have to do the same thing?

21 MR. JACOBS: That's exactly what this is, Your
22 Honor, a fishing expedition.

23 MS. CHAITMAN: They know where they are.

24 MR. JACOBS: One of the exact criteria under Rule
25 26B2 is she has equal access to the records that we do.

1 THE COURT: And, again, this comes back to my
2 understanding of the records. If you have tables of content
3 or indices...

4 MR. JACOBS: I do.

5 THE COURT: I don't want to see them now.

6 MR. JACOBS: Okay.

7 THE COURT: If you have those things and somebody
8 can look at them and see the subject matter of what they
9 want to look at, figure out what to look at, fine.

10 MR. JACOBS: There is a subfolder in Data Room 1
11 that is called DTC that has all of those records.

12 MS. CHAITMAN: I'm not asking for -- I have the
13 DTC records.

14 THE COURT: She wants other non-DTC records.

15 MR. JACOBS: To the extent we have them in
16 addition to publicly available information that we obtain,
17 it's all in the data room clearly labeled.

18 THE COURT: You'll have to show me when the time
19 comes. 17 -- these are the number of employees that work
20 for each unit.

21 MR. JACOBS: Yes, Your Honor. And as I had
22 mentioned before, we provided a specific chart that contains
23 this exact information, even though I believe we're not
24 obligated to because it had already been made available in
25 the data room and could've been found with the click of a

1 mouse.

2 MS. CHAITMAN: I've asked for each year of the
3 operation. I have it only for the last year.

4 MR. JACOBS: To the extent we have it, again, the
5 Defendant has equal access to those documents. We shouldn't
6 have to do their work for them.

7 THE COURT: And how would she know who's working
8 for which division each year?

9 MR. JACOBS: Your Honor, how would we know? The
10 Trustee doesn't have personal knowledge. We would have to
11 do an investigation, which is what the Defenders would do.

12 THE COURT: This is interrogatory. How would you
13 do that investigation?

14 MR. JACOBS: We would do exactly what Ms. Chaitman
15 would have to do and start searching through the document
16 repository to find supporting documentation that would
17 answer those questions based on our best ability, without
18 personal knowledge of having been present at the time.

19 THE COURT: Well, you know, that's an aspect of
20 the case. Nobody really has personal knowledge, who's
21 involved in the case at this point.

22 MR. JACOBS: Right.

23 THE COURT: Everything is through records.

24 MR. JACOBS: But also, Your Honor, what's the
25 relevance? What is the relevance?

1 THE COURT: Well, her argument, though, is that it
2 wasn't a Ponzi scheme if, of the 200 employees, 190 were
3 working for the so-called legitimate divisions of BLMIS, and
4 those divisions were generating a lot of money. Now, that's
5 probably not the case...

6 MR. JACOBS: Right.

7 THE COURT: ...in terms of generating money; I
8 don't know about the number of employees, from everything
9 I've seen. But, you know, I guess it's relevant to whether
10 or not there was a Ponzi scheme on the date of a transfer.

11 MR. JACOBS: Well, all of the financial
12 information concerning the House Five's operations is in the
13 data room in a folder...in various folders. That's
14 available to the Defendants -- as it's discussed in the
15 report of Mr. Dubinsky.

16 THE COURT: I didn't understand 19.

17 MS. CHAITMAN: You didn't understand the
18 interrogatory?

19 THE COURT: Yeah. I just had a note here, I
20 didn't understand. Let me read it again.

21 MR. JACOBS: Well, Your Honor --

22 THE COURT: Let me just read it.

23 MR. JACOBS: Okay.

24 THE COURT: Oh, the reason I guess I didn't
25 understand it is I didn't think BLMIS held any stock.

1 MS. CHAITMAN: Well, it was Madoff until 2001, and
2 then nit was BLMIS. There were times when Madoff did trades
3 equal to 10 percent of the daily volume on the New York
4 Stock Exchange. He had a huge portfolio of securities.

5 So, what I'm asking is -- I mean, let's assume
6 that every security which was listed on the split strike
7 conversion customer statements was actually held in huge
8 volumes by Madoff at the time. It simply wasn't allocated
9 to the investment advisory --

10 THE COURT: But I thought it wasn't held. I
11 thought he never engaged in a securities transaction.

12 MS. CHAITMAN: Only -- what the Trustee has said,
13 he never engaged in securities transactions in the
14 investment advisory business.

15 THE COURT: Right.

16 MS. CHAITMAN: He had huge stock positions with
17 the same securities... I mean, I've been able to do this
18 with the DTC records. I can show that every security that
19 was listed on an investment advisory customer statement was
20 held by Madoff at that time.

21 THE COURT: Mm hmm.

22 MS. CHAITMAN: But the point is, I can't go back
23 before 2002, and I'm asking the Trustee if he has the
24 records to give that to me.

25 THE COURT: So, how is this interrogatory

1 different from, I think it was 16 he was talking about? 16
2 doesn't ask to identify the specific stock but...

3 MS. CHAITMAN: I'm just getting the volume.
4 Because one of the arguments will be that the investment
5 advisory volume was X percent of the total and, therefore,
6 this was not a Ponzi scheme.

7 THE COURT: And what does 18 relate to?

8 MS. CHAITMAN: 18 relates to the specific
9 securities. In other words, the Trustee's position is that
10 Madoff did not own the securities that were shown on the
11 statements. And, in fact, I've already established that
12 Madoff did own the securities that were shown on the
13 statement; not in the volume that was on the statement.

14 THE COURT: Owned them in its own name?

15 MS. CHAITMAN: Madoff's or BLMIS. Yeah, for that
16 period it's BLMIS, yes. Yeah, they held securities. They
17 were a huge securities dealer. So then how do you decide
18 whose securities they were?

19 THE COURT: Well, BLMIS held it in its own name,
20 right?

21 MS. CHAITMAN: Yeah. But the thing is if you buy
22 100 shares of IBM today from Merrill Lynch, they don't have
23 to actually get the securities and stick them in your
24 pigeonhole. They have them on account; they owe it to you.

25 THE COURT: And how is this relevant to the

1 lawsuit?

2 MS. CHAITMAN: Because there's no... The basis of
3 the Trustee's argument is that there were no securities ever
4 purchased. There was one entity, whether it was Madoff as
5 the sole proprietor or BLMIS, there was one entity operating
6 a company with 200 employees, of which a very small
7 percentage were involved in the investment advisory
8 business. If that entity held securities positions, who's
9 to say that they couldn't have been allocated to Mrs.
10 Wilenitz?

11 MR. JACOBS: I think that is a tenuous assertion
12 at best. And Ms. Chaitman again needs to make a showing
13 that those securities were actually held on behalf of the IA
14 business customer and her defendant, I think, in order to
15 show an entitlement to discovery.

16 THE COURT: How would she show the allocation, or
17 how would you show that they weren't --

18 MR. JACOBS: Well, I mean, Ms. Chaitman says she's
19 done an inventory of the DTC records and it looks like there
20 might've been a stock held at some point in connection with
21 some function of BLMIS that matches the name of a stock
22 appearing on a customer statement. That's not proof that
23 the stock was ever bought or sold on behalf of that customer
24 for their account.

25 THE COURT: But what would you have to show to

1 prove that? I'm assuming in the best of circumstances you
2 have BLMIS owning 100 shares of IBM.

3 MR. JACOBS: Right.

4 THE COURT: And the Wilenitz account statement
5 showing 50 shares of IBM.

6 MR. JACOBS: Right. Well, as is discussed at
7 length in our expert report, one example is that many of the
8 customer statements reflect purported stock trades that
9 couldn't have been possible given the price and the amount
10 purported to have been sold as reflected on the customer
11 statements.

12 THE COURT: But she's saying something different
13 on this one. She's saying there was an actual trade and
14 BLMIS owned an actual stock from one of its other
15 businesses.

16 MR. JACOBS: Right.

17 THE COURT: One of the (indiscernible) divisions.

18 MR. JACOBS: Right.

19 THE COURT: And then she's saying, you know what?
20 I realize this is supposition at this point. The Wilenitz
21 account statement shows the same stock.

22 MR. JACOBS: Right.

23 THE COURT: So, there was actually a purchase, and
24 who's to know whether or not that purchase or a portion of
25 that purchase was allocated to Wilenitz? In my example,

1 BLMIS bought 100 shares of IBM and 50 shares show up on
2 Wilenitz.

3 MR. JACOBS: Right.

4 THE COURT: Who's to say he didn't actually own
5 that stock?

6 MR. JACOBS: I would love to be able to --

7 THE COURT: Which I guess would be relevant to his
8 net equity claim or his claim in the SIRA case.

9 MR. JACOBS: I wish I could give you a
10 satisfactory answer but in the time that we have today, I
11 can't replicate the report of our expert, which, in
12 painstaking detail goes through all of the reasons why we
13 believe there was never a security traded in connection with
14 the fraudulent Ponzi scheme being operated and the IA
15 business.

16 THE COURT: So, how does she test that conclusion?

17 MR. JACOBS: She tests that conclusion the same
18 way our expert does, by examining the underlying records.
19 All of those records again have been made available to Ms.
20 Chaitman. They're in the data room. Those other records
21 are expert reports.

22 THE COURT: Maybe that's the answer. If there are
23 records -- because they do have the DTC records, at least
24 from the period when Wilenitz was investing. If the records
25 show that BLMIS actually owned something, and the same stock

1 shows up in Wilenitz's account statement, you can make the
2 argument that he actually owned that stock. But you can do
3 that (indiscernible) and the information has been made
4 available to you.

5 And the sense I'm getting -- and I understand that
6 it's a lot of work -- is you want the Trustee to do this for
7 you, but you're going to have to do this yourself if this
8 stuff is available.

9 MS. CHAITMAN: You know, Judge, with 4 million
10 pages of documents, the least the Trustee could do is
11 specify the specific Bates Numbers. Because I don't want to
12 be in a position where we go to trial... I mean, for all I
13 know, the data room is updated constantly and new documents
14 are added. How am I going to prove at trial that certain
15 documents were not made available to me? I mean, it's
16 impossible. Why can't the Trustee be bound to tell me these
17 are the documents responsive to this request?

18 THE COURT: But that doesn't solve your problem...
19 Well, if the Trustee has additional documents, he's got to
20 supplement the disclosure or the production, which he does
21 by adding them to the data room, and maybe you have a
22 continuing duty to check the data room.

23 But part of the problem is you've thrown such a
24 broad net over what you're looking for, instead of the
25 specific documents relevant -- that I think seem to be

1 relevant to this particular case, that you run into a
2 situation where there may be documents added about something
3 but they have nothing to do with Wilenitz.

4 MR. JACOBS: And, Your Honor, specifically to
5 respond to Ms. Chaitman's concern about the data room being
6 voluminous, and I understand that 4 million records is
7 overwhelming, but that's the reason why the procedures order
8 permits us to provide an expert summary report to support
9 our claims and to satisfy our burdens of proof, which
10 specifically discusses all of that data, identifies all of
11 the Bates Numbers of the documents that are used to support
12 various conclusions -- and at a minimum, Ms. Chaitman is
13 free to depose those experts and to test and challenge any
14 of those analyses based on any of the documents they've
15 relied upon or that she has access to in discovery.

16 And no one's challenging her right to do that.
17 What we're saying is that we shouldn't have to do more than
18 what we've already done because we have invested enormous
19 amounts of resources and time in finding a way to make all
20 of those information available to all litigants in order for
21 them to conduct their own investigations and have access to
22 the same information that we do.

23 THE COURT: Well, you know, I started out by
24 saying, I can't tell you not to make a motion to compel, but
25 I think that if you go back, for example, and look at the

1 omnibus decision last June, for instance, it talks about the
2 compensation issue -- it's certainly applicable to all the
3 cases which are involved. I think you preserve that issue.

4 And I'm sure the Trustee, so the Trustee doesn't
5 have to respond to all these things, will agree, yeah, you
6 preserve the issue but you're not entitled to discovery on
7 these issues for that reason. But there just seems to be
8 very little communication, and I don't know what the answer
9 to that is.

10 Okay, you had raised some other issues and Mr.
11 Dexter raised some issues in a letter...

12 MS. CHAITMAN: I think that had to do with the
13 subpoenas, and I'm going to have to deal with that
14 separately.

15 THE COURT: Well, what was that issue? Have we
16 resolved all of the issues raised by the Trustee?

17 MR. JACOBS: Yes, except for, Your Honor, I'd like
18 to clarify that we would also like to submit a motion for a
19 protective order on this discovery.

20 THE COURT: Well, she's going to make a motion to
21 compel. I'll just stay it until I resolve the motion to
22 compel.

23 MR. JACOBS: Okay.

24 THE COURT: I don't need a motion for a protective
25 order and a motion to compel on the same discovery.

1 MR. JACOBS: Right. Well, we did ask for the
2 relief first and I believe from a fairness -- we should be
3 entitled to make --

4 THE COURT: Do you want to wait for them to make a
5 motion for --

6 MS. CHAITMAN: It doesn't matter. If he wants to
7 make the motion...

8 MR. JACOBS: I'm trying to avoid unnecessary
9 duplicate briefing.

10 THE COURT: All I'm saying is -- maybe this is
11 wishful thinking, but if she makes the motion to compel, on
12 reflection she might not ask about Picard's compensation,
13 for example.

14 MR. JACOBS: Okay.

15 THE COURT: And that will save everybody the job
16 of dealing with that issue. But I don't know if that's
17 going to be the case.

18 MS. CHAITMAN: Judge, on Picard's compensation, I
19 understand you ruled on that and it's applicable to every
20 case. I'm not...

21 THE COURT: Well, if you're concerned -- I'm not
22 going to rule on it again. If you're concerned -- if the
23 record is preserved, it's preserved. But that doesn't seem
24 to have any effect on these cases, if I rule on something.
25 That's my only point. It goes both ways, by the way. Don't

1 smirk.

2 MR. JACOBS: No smirk here.

3 THE COURT: Yeah, it seems that everybody seems to
4 ignore prior rulings in this case when we litigate things.
5 All right, what else from the Trustee?

6 MR. JACOBS: That is it from our perspective, Your
7 Honor.

8 THE COURT: Are there any other issues?

9 MS. CHAITMAN: That's it.

10 THE COURT: What did Mr. Dexter raise?

11 MS. CHAITMAN: He was raising the Rule 45 subpoena
12 issue, but I want to go back...

13 THE COURT: And what is that issue?

14 MS. CHAITMAN: The issue is whether the Sarah
15 Lawrence order as to the procedure is going to go forward.
16 You clarified that you don't feel it's appropriate and that
17 the Trustee can serve the subpoenas. But you're telling me
18 that if, in fact, people can stipulate to the records...I
19 mean, I just want to clarify that because --

20 THE COURT: You know, the devil is in the details.
21 And it sounded so easy to resolve it that way but it just
22 hasn't gotten resolved.

23 MS. CHAITMAN: No, I appreciate that. I agree
24 with you.

25 THE COURT: What I will not do is stay discovery

1 pending, you know, a meet and confer, anything like that.

2 If you get discovery and you think -- or you get a notice of
3 a subpoena on a bank, and you can unconditionally say that
4 the records are the records...

5 MS. CHAITMAN: Well, the records are the records
6 for the period covered by the bank documents. People cannot
7 possibly stipulate to transfers ten years ago.

8 THE COURT: Well, but then if you can't, I guess
9 he's entitled to the bank documents. And if the answer
10 is... We talked about this, whether there were periods that
11 could be carved out. Even that wasn't answered clearly in
12 the...

13 MS. CHAITMAN: But if a bank only has records
14 going back to 2006, why is the price of protecting those
15 records that you have to concede to all the transfers going
16 back to 1982?

17 THE COURT: Yeah, but you can concede to all the
18 transfers going back to 2006 in your example.

19 MS. CHAITMAN: We did that, and that was --

20 THE COURT: That was not my recollection.

21 MS. CHAITMAN: All right.

22 THE COURT: Go back and look at your responses to
23 the nine or so cases that we dealt with, and every one of
24 them retracts or has a caveat to what is essentially an
25 admission. And remember what we're trying to accomplish

1 here. You know, cut down on the issues that have to be
2 tried. And if they don't do that, then they don't serve
3 their purpose and everybody goes about and takes discovery,
4 that's all. All right.

5 MS. CHAITMAN: Okay.

6 MR. JACOBS: Your Honor, there were also
7 objections to subpoenas in three cases handled by my
8 colleague, Ms. Longo, as conflicts counsel for the Trustee.

9 MS. CHAITMAN: It's the same issue, and at this
10 point I understand Your Honor's position so...

11 THE COURT: Well, Wilenitz is one of them.

12 MS. CHAITMAN: They have those documents already.

13 MR. JACOBS: Right. Wilenitz was part of the --

14 THE COURT: And the RAR...

15 MR. JACOBS: RAR is our case, and if Ms. Chaitman
16 is withdrawing the objection, we've served the subpoena...

17 THE COURT: I haven't seen the responses to the
18 admissions or whatever.

19 MS. CHAITMAN: With RAR we will stipulate to the
20 deposits and withdrawals for the period that --

21 THE COURT: That's all well and good. When you
22 send him the -- whatever it is -- the stipulation or the
23 affidavit that proves that or requires that, then ask him to
24 withdraw the subpoena. And I guess we'll have to deal with
25 that again if he refuses to withdraw the subpoena.

1 And the reason I say that is I've seen the
2 responses in the other cases and the non-responses. That
3 would compel to withdraw --

4 MS. CHAITMAN: I'm saying on the record that we
5 will stipulate to the deposits and withdrawals for the
6 period covered by the bankruptcy.

7 THE COURT: And what I'm saying on the record is
8 when that is writing in a satisfactory form, then we'll deal
9 with it, okay?

10 MS. CHAITMAN: Okay.

11 THE COURT: Is there anything else?

12 MS. LONGO: So, just to clarify, Your Honor, I'm
13 sorry, with respect to the two cases that are handled by
14 Wilenitz, is there a withdrawal of the objection in those?

15 THE COURT: She's not withdrawing the objections.

16 MS. CHAITMAN: I'm not withdrawing the objections.

17 MS. LONGO: You'll go back and check...I
18 understand.

19 THE COURT: She's going to go back and see if she
20 can stipulate to the withdrawals -- either all the
21 withdrawals and deposits or for whatever period it is.

22 MS. CHAITMAN: Right.

23 THE COURT: And then you may be entitled to
24 records before that, although you're only asking, I think,
25 for three years anyway.

1 MR. JACOBS: All of our subpoenas are different
2 depending on how long we --

3 THE COURT: Every one I've seen is the two years
4 before the filing date and one year after.

5 MS. CHAITMAN: Now they're going back to 2001.

6 MR. JACOBS: Well, there are some cases --

7 THE COURT: Well, I'm surprised they haven't.
8 I'll tell you. Because, you know, this issue with
9 fictitious profits is the same. And you can't just look at
10 the two years. You've got to go all the way back to the
11 beginning of the account. And I was surprised when they
12 limited it to two years for that reason. I was also
13 surprised about the insolvency issue but...life is full of
14 surprises. How was Barcelona? Was it good?

15 MS. CHAITMAN: Oh, my God, I loved it.

16 THE COURT: All right, anything else?

17 MS. LONGO: I was just going to say, to be clear,
18 our two do go back further than the two years. So I think
19 the stipulation would have to cover all of those transfers.

20 THE COURT: Whatever it is. I mean, it sounds to
21 me that if you go far back enough, you're going to get a
22 response from the bank that says, we don't have the records,
23 you know, but so be it.

24 MS. CHAITMAN: Thank you very much.

25 THE COURT: All right.

1 MR. JACOBS: Thank you, Your Honor.

2 (Whereupon these proceedings were concluded at

3 12:17 PM.)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

Digitally signed by Sonya Ledanski
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